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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANDREW S. BISOM et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

NANCY HOWELL,

Defendant, Cross-complainant and Appellant.

G052925

(Super. Ct. No. 07CC06921)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randall L. Wilkinson, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed. Motion to augment granted. Requests for judicial notice granted.

Nancy Howell, in pro. per., for Defendant, Cross-complainant and Appellant.

The Bisom Law Group, Andrew S. Bisom; Eisenberg Law Firm and Mark W. Eisenberg for Plaintiffs, Cross-defendants and Respondents.

* * *

In 2006, defendant Nancy Howell retained two attorneys, plaintiffs Andrew Bisom and Mark Eisenberg (collectively, "the Attorneys"), to pursue a lawsuit against her homeowners association (HOA) for false arrest. When Howell signed a retainer agreement she did not disclose that she had multiple ongoing lawsuits with the HOA, and the HOA had an outstanding $240,000 judgment against her. As the Attorneys prepared to go to trial on the false arrest claim, Howell signed a Global Settlement Agreement with the HOA, without notifying or compensating the Attorneys.

In 2008, the Attorneys filed a lawsuit against Howell alleging breach of contract (the retainer agreement), fraud, and related claims. Following a trial, a jury awarded the Attorneys $48,000. But just before the entry of judgment, Howell filed for bankruptcy, which effectively stayed the proceedings. (See 11 U.S.C. § 362(a)(1).)

In 2015, Howell filed an appeal, raising several grounds. We asked for additional briefing as to whether Howell's appeal was timely filed. The additional briefs and the attached exhibits did not precisely address the issue. But we need not resolve the timeliness question. Howell's appeal fails on its merits.

Thus, we affirm the judgment. We also grant the outstanding motion to augment the record and the requests for judicial notice. (Evid. Code, § 450 et seq.)

I

FACTS AND PROCEDURAL BACKGROUND

In May 2005, Howell spoke at a meeting of the Oso Valley Greenbelt HOA. After one or two board members signed citizen arrest forms, police arrested Howell for disorderly conduct and took her to jail for a short time.

In May 2006, Howell filed a complaint against two HOA board members alleging false arrest, false imprisonment, and related torts. Howell was initially represented by an attorney, Dean Smart. But over Howell's objection, the court later relieved Smart as counsel of record. Howell then proceeded as a self-represented litigant.

In September 2006, Howell met with the Attorneys in Bisom's Costa Mesa office. Howell and the Attorneys discussed the facts of her alleged false arrest; there was an agreement to add the HOA as a defendant. Howell signed a retainer agreement, which provided that the Attorneys would be paid on a contingency basis: 40 percent of any monies recovered, minus costs and expenses. Howell did not tell the Attorneys she was involved in three other lawsuits with the HOA. Howell also did not disclose to the Attorneys that the HOA had a pending judgment against her in an unrelated prior lawsuit (approximately $240,000).

In February 2007, Howell signed a Global Settlement Agreement with the HOA. A separate attorney represented Howell in that matter (not Smart, Bisom, or Eisenberg). The global settlement provided that the HOA would dismiss the $240,000 judgment against Howell, in exchange for her dismissal of the false arrest lawsuit, along with a cash payment to Howell of $4,000. The Attorneys did not learn of the other pending lawsuits or the settlement agreement until later. Bisom later testified at trial that the false arrest lawsuit is what caused the settlement: "The fact that [Howell] felt that would be advantageous not to disclose the prior cases to us leads me to believe she was simply using us to leverage a settlement with the [HOA] . . . ."

The Instant Lawsuit

On June 14, 2007, the Attorneys filed the instant lawsuit (and later an amended complaint) against Howell alleging breach of contract (the retainer agreement), fraud, and related claims. The Attorneys sought damages for the reasonable value of the services they rendered, or in the alternative 40 percent of the financial benefit Howell received in the Global Settlement Agreement (the HOA's dismissal of the $240,000 judgment). Howell filed a cross-complaint for legal malpractice.

On August 21, 2008, a jury found in favor of the Attorneys on the breach of contract and fraud claims, and awarded them $48,080.94 in compensatory damages. The

jury also awarded $144,243.71 in punitive damages, which the court later struck. The jury found against Howell as to her cross-claims. Howell appeals from the judgment.

II

DISCUSSION

Howell argues there was insufficient evidence: 1) she intended to defraud the Attorneys; 2) the Attorneys suffered damages; and 3) she had a duty to disclose her ongoing HOA litigation to the Attorneys. Howell also argues there was "misconduct" committed by: 1) Eisenberg; and 2) the trial court.

A. Insufficient Evidence Claims (3)

The standard of review is well settled. Our review "*begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Substantial evidence is reasonable, credible, of solid value, and of ponderable legal significance. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.)

A judgment will be upheld if it is supported by substantial evidence, even if contrary evidence exists and the jury might have rendered a different result had it believed this evidence. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.) In this review we cannot "'reweigh the evidence or reassess the credibility of witnesses.'" (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531.)

"The elements of a cause of action for breach of contract are: "'(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's

breach, and (4) the resulting damages . . . .""" (*Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391.) The elements of "fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.)

1. Sufficient Evidence Howell Intended to Defraud the Attorneys

"Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation . . . ." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482.) Fraudulent intent is a question of fact; a person's intent is ordinarily proven by circumstantial evidence. (*Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 368.) "The inferences to be drawn from circumstantial evidence are for the jury's determination and if conflicting inferences may reasonably be drawn from the evidence which inference is to be drawn lies in the jury's discretion." (*Halstead v. Paul* (1954) 129 Cal.App.2d 339, 341.) "[A] reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary." (*Ibid*.)

Bisom testified that before Howell signed the retainer agreement she did not disclose that she was involved in other litigation with the HOA, or that the HOA had a $240,000 judgment against her. Eisenberg similarly testified that Howell did not disclose the ongoing litigation or the pending judgment. Eisenberg further testified, "If I knew then what I know now, the reality is this case was destined to be problematic from the first instance. It was clear that our client, Mrs. Howell, had an agenda that had not been shared with us. She clearly was looking to escape the underlying judgment and the ramifications of that judgment including the pursuit of her assets which started only one day before our retention [a debtor's exam]."

Based on the testimony of Bisom and Eisenberg, as well as the totality of the evidence, a jury could have reasonably inferred that Howell's concealment of the ongoing HOA litigation was intentional. That is, it was reasonable for the jury to infer that Howell deliberately sought to leverage the services of the Attorneys—in the false arrest lawsuit—in order to secure the HOA's settlement of the outstanding $240,000 judgment against her. In order to accomplish that end, Howell would presumably need to keep the Attorneys unaware of what was going on with her pending litigation involving the HOA. Thus, there was sufficient evidence of fraudulent intent.

Howell argues that there was other evidence in the record that tends to show that her failure to disclose "was merely an unintentional omission." But it is not the role of an appellate court to relitigate these kinds of factual findings by a jury. In a substantial evidence review, we cannot "'reweigh the evidence or reassess the credibility of witnesses.'" (*In re Marriage of Balcof*, *supra*, 141 Cal.App.4th at p. 1531.) Having found substantial evidence to support the jury's finding of Howell's fraudulent intent, we must affirm the presumed sound judgment of the jury.

2. Sufficient Evidence of Damages

An injured party may recover for a breach of contract the amount which will compensate it "for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed. (Civ. Code, § 3358.) "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252.) "A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Ibid*.)

Bisom testified that in preparing Howell's false arrest case for trial, he had worked on the matter for 42.1 hours at a rate of $395 per hour ($16,629.50), and had spent additional monies on costs and fees. Eisenberg testified that he had worked on the matter for 42.8 hours at the rate of $400 per hour ($17,120.00), plus other associated costs. The Attorneys each testified that they were not reimbursed for their time, costs, or expended fees.

Jerry Gans testified as an expert attorney witness (without objection) on behalf of the Attorneys. Gans testified that the rates charged and hours billed by Bisom and Eisenberg were "reasonable, and . . . necessary in the pursuance of [Howell's] case." Gans said that the contingency fee arrangement was clearly stated in the retainer agreement and "also specifically spells out what the fee will be." Gans opined that Howell received $240,000 in consideration from the HOA in the form of the global settlement, which "was precipitated by the actions [the Attorneys] undertook on her behalf in the false imprisonment case." Gans further opined that based on the retainer agreement, the Attorneys were entitled to 40 percent of the consideration Howell received from the HOA.

The testimony of Bisom, Eisenberg, and Gans provides sufficient evidence to support the jury's damage award. As far as the breach of contract claim, a jury could reasonably determine that had Howell not breached the retainer agreement, it is reasonably probable the Attorneys would have been compensated for their services according to the contingency fee arrangement. This inference is supported by the fact that the HOA ultimately settled the false arrest claim by forgiving Howell's $240,000 judgment. And as far as the fraud claim, the jury could have reasonably concluded that had Howell not concealed her ongoing litigation with the HOA, and the pending $240,000 judgment against her, the Attorneys would not have agreed to represent Howell, and therefore they would not have been defrauded of their time and resources.

Howell argues that the Attorneys did not sustain "any out of pocket expenses because of their reliance on the alleged concealment" and that they were not entitled to damages. But again, in making these factual arguments, it appears that Howell may misapprehend the role of an appellate court. "[I]t is . . . beyond our domain to second-guess the jury's determination of credibility." (*People v. McDaniels* (1980) 107 Cal.App.3d 898, 903.) Substantial evidence supports the jury's determination and we are "without power to substitute [our] deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

3. Sufficient Evidence Howell Had a Duty to Disclose

Generally, a fiduciary relationship imposes a duty to disclose. (*Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 750, fn. 5.) However, the "law also recognizes that a party having exclusive knowledge of information materially affecting the value of a transaction may [also] have a duty to disclose that information . . . even in the absence of a fiduciary relationship." (*Ibid*.) A relationship between the parties is present if there is "some sort of *transaction* between the parties. [Citations.] Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or *parties entering into any kind of contractual agreement*." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 337, second italics added.)

Here, the evidence showed that Howell and the Attorneys entered into a relationship in the form of a written contract. The retainer agreement was: "To pursue a claim for false arrest, false imprisonment, intentional infliction of emotional distress, etc. against [the HOA] et al., for instigating a citizen's arrest on May 10, 2005." As far as the respective duties: "The Attorneys shall provide those legal services reasonably required to represent [Howell] in the matter described above." And as far as Howell's duties, she was to "cooperate with the Attorneys" and to "keep them informed of developments"

associated with the legal services. Thus, because of the contractual arrangement, there was sufficient evidence for the jury to determine that Howell had a duty to disclose to the Attorneys the existence of her on-going lawsuits with the HOA and the pending $240,000 judgment against her.

Howell also argues that the jury *did not find* that she was under a duty to disclose. Howell's argument appears to be a challenge to both the jury instructions and the verdict form (a finding of a duty to disclose was not included on the verdict form). But these arguments have been forfeited on appeal. Howell did not include the jury instructions in the appellate record. (See *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935-936 [appellant's failure to provide adequate record for appeal on an issue requires that the issue be resolved against appellant].) Further, there is no indication that Howell objected to the jury instructions or the special verdict form at trial. (See *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335 ["In order to complain of failure to instruct on a particular issue the aggrieved party must request the specific proper instructions"]; see also *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 858 ["where the record is devoid of any showing that appellants objected to the special verdict questions, any inherent error therein is waived"].)

B. Alleged "Misconduct" by Eisenberg and the Trial Court

Howell argues that Eisenberg and the trial court committed various errors during the jury trial, which she characterizes as "misconduct." We disagree.

A "trial court has wide discretion in the conduct of a trial and unless it can be shown that there was an abuse of discretion, an appellate court will not interfere" with the judgment. (*Kraft v. Nemeth* (1952) 115 Cal.App.2d 50, 52.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) Under an abuse of discretion standard, we

will reverse only if the court's decision was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"'An appellate court will ordinarily not consider procedural defects or erroneous rulings in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method. [Citations.] [¶] The circumstances may . . . be appropriately classified under the headings of estoppel or waiver. [Citations.] Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.'" (*County of Los Angeles v. Surety Ins. Co.* (1989) 207 Cal.App.3d 1126, 1133, italics in original.)

1. Alleged "Misconduct" by Eisenberg

"The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." (Evid. Code, § 765, subd. (a).) "A party to the record of any civil action, or a person identified with such a party, may be called and examined *as if under cross-examination* by any adverse party at any time during the presentation of evidence by the party calling the witness." (Evid. Code, § 776, italics added.)

In a civil action, a plaintiff can call a defendant to testify and then impeach him or her. (*Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 6, fn. 6.) "The credibility of a witness may be attacked or supported by any party, including the party calling him." (Evid. Code, § 785.) A party may attack a witness's credibility by attempting to show his or her bias, personal interest, or any other motive to lie. (See Evid. Code, § 780, subd. (f).) "The proponent of the impeachment evidence must have a good faith basis for asking the question." (*People v. Pearson* (2013) 56 Cal.4th 393, 34.)

Here, the Attorneys called Howell as their first witness. Eisenberg conducted the direct examination as though it were a cross-examination; Eisenberg asked leading questions and he generally attempted to limit Howell to "yes" or "no" answers. This is commonplace and permitted under the Evidence Code. Howell generally argues on appeal that Eisenberg personally attacked her during the questioning. But Howell did not object during the trial, so this claim of error has been forfeited on appeal. (See *County of Los Angeles v. Surety Ins. Co.*, *supra*, 207 Cal.App.3d at p. 1133.) In any event, Eisenberg's questions did not go beyond what would normally be expected during a party's cross-examination of an adverse witness.

Howell also argues that Eisenberg asked her about a "surprise document" during the examination (a notice to appear at a judgment debtor's examination), and also attacked her character during his closing argument. But again, Howell did not object on these points during the trial, so the arguments have been forfeited for purposes of appeal. Further, it appears Eisenberg had a good faith basis to question Howell as to the notice to appear. Moreover, Eisenberg's arguments challenging Howell's veracity were entirely appropriate, particularly given that fraud was one of the two causes of action.

2. Alleged "Misconduct" by the Court

A litigant is entitled to a fair trial, but not necessarily a perfect trial. "Although the trial court has both the duty and the discretion to control the conduct of the trial [citation], the court 'commits misconduct if it persistently makes discourteous and disparaging remarks . . . .' [Citation.] Nevertheless, '[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' [Citation.] Indeed, '[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the

judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.'" (*People v. Snow* (2003) 30 Cal.4th 43, 78.)

Howell generally argues on appeal that the trial court disliked her pro bono trial attorney, Philip Putman. For instance, she states that "before the completion of the trial . . . in the presence of the jury" the court "reprimanded [Putman] . . . for eating candy." But we find this comment by the court—as well as Howell's other perceived slights—to be innocuous. As always, we presume the jury was composed of reasonably intelligent people who followed the court's instructions, and they were not affected by such trivial distractions. (See *People v. Gonzales* (2011) 51 Cal.4th 894, 940 ["It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions"].)

Howell also argues that the trial court disparaged her expert witness. During the expert's testimony, as to her counterclaim for legal malpractice, the court told Putman, "I don't know if you're noticing this or not, but they're laughing at him. It's horrible and it's a waste of everybody's time, particularly the jury's. It's in your best interest that this man get off this stand as soon as possible." But the court's comments occurred during a sidebar outside of the presence of the jury. Taken in context, it appears the court was, in fact, attempting to aid Putman in his presentation of Howell's case to the jury.[1] In sum, we see no indication whatsoever that the trial court denied Howell (or the Attorneys) a fair trial.

[1] To the extent that Howell may be alleging Putman provided ineffective assistance of counsel, we disagree. (See *Walker v. State Bar* (1989) 49 Cal.3d 1107, 1116 ["the right to counsel has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation"]; see also *In re Marriage of Campi* (2013) 212 Cal.App.4th 1565, 1575 ["the general rule is that attorney neglect in civil cases, if any, is imputed to the client"].)

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.